



Staff Report

APPEAL OF THE PLANNING COMMISSION DECISION TO DENY A REAR YARD SETBACK VARIANCE AT 1814 OAK KNOLL DRIVE

Honorable Mayor and Council members:

Summary

On October 8, 2003, by a 4-1 vote (1 recused & 1 absent), the Planning Commission adopted Resolution 2003-50 denying a Setback Variance to allow a deck extension to encroach four feet into the required fifteen foot rear yard setback at 1814 Oak Knoll Drive. The Commission reviewed the project at their September 16, 2003 meeting and voted 5-1 (1 recused) to direct staff to prepare a resolution outlining the specific Variance findings for denial made by the Commission based on discussion at that 9/16/03 meeting. A transcript of both the 9/16/03 and 10/8/03 Planning Commission hearings are attached.

Based on a review of the appeal and of the Commission's action, staff recommends that the City Council deny the appeal and uphold the Planning Commission's decision to reject the project.

Background

Specific actions relating to the requested Setback Variance prior to Commission action on 9/16/03 and 10/8/03 are as follows:

- On February 19, 2002, by a 5-0 vote, the Planning Commission adopted a Resolution denying the Setback Variance for the deck extension. This resolution was adopted after Commission reviewed the project at its February 5, 2002 meeting and voted 6-0 for denial. Mr. Eckert filed an appeal of the decision on February 28, 2002.
- On May 14, 2002, by a 3-2 vote, the City Council sustained the decision of the Commission denying the Setback Variance.
- In August 2002, Mr. Eckert filed suit against City of Belmont seeking a writ of mandate to set aside the Planning Commission and City Council decision denying the variance. As a result of the court ordered mandatory settlement conference, the City Council agreed to hear the matter again. Mr. Eckert provided new information in relation to the variance request to the City in April 2003.

- On July 8, 2003, the City Council held a new public hearing and directed the matter back to the Planning Commission for review in light of the new information provided by Mr. Eckert in April 2003.

The following provides a chronology of actions for the project since the Planning Commission adopted Resolution 2003-50 denying the Setback Variance on October 8, 2003:

- On October 20, 2003, Mr. Steven Eckert, project applicant, submitted an appeal of the Planning Commission decision. The appeal was scheduled for City Council review at the March 9, 2004 Council meeting. However, prior to the hearing Mr. Eckert requested continuance of the item to prepare additional submittal information for his appeal.
- On May 25, 2004, Mr. Eckert presented additional information (in a CD-ROM format) in support of his request.
- On July 13, 2004, the City Council reviewed the matter, continuing the item and directing staff to bring the matter back to the City Council for hearing of the appeal including a presentation of the additional appellant submittal material.
- On July 23, 2004 the City Clerk provided a letter to Mr. Eckert requiring eight (8) hard copies of Mr. Eckert's CD-ROM with the additional appeal submittal information.
- On December 14, 2004 Mr. Eckert provided eight (8) hard copies of the additional appeal submittal information to City of Belmont.

Site History/Project Description

The subject lot was originally established as part of the Belmont Country Club Subdivision No.1 in 1924. The property was resubdivided in the mid 1970's and the original dwelling was constructed in 1978. The City Council approved a Floor Area Exception to construct a 478 square foot addition for the lowest level of the dwelling which included a family room, bathroom, and study in 1991. In 1993, the applicant received approval of an administrative floor area exception to construct a 98 square foot addition within the middle level of the dwelling below the garage and underneath the driveway.

The property has an existing deck which extends six feet off the upper rear level of the residence, leaving the required minimum setback of fifteen feet. The existing deck extends the entire 40-foot width of the residence for a total of approximately 240 square feet. The proposed four-foot extension would add 120 square feet of deck area (360 square feet total for this deck) for the dwelling.

Project Data

Criteria	Project Dimensions (existing)	Proposed	Required or Max. Allowed
Lot Size	3,535 square feet	No Change	6,000 square feet
Slope	30%	No Change	NA
Dwelling square footage	2,619 square feet (200 square feet of covered deck no longer counted as floor area)	No Change	2,619 Square feet - Approved FAR Exceptions – 1991, 1993
Deck Square Footage	240 square feet	360 square feet	NA
Setbacks:			
Front	17'	No Change	15-30'*
Side (right)	5'	No Change	6'
Side (left)	5'	No Change	6'
Rear	15'	11'	15'

* As there are no building additions proposed for the front of the dwelling that would reduce the current front yard setback beyond existing, the provisions of Section 9.7.4 (setback averaging) were not evaluated. The project maintains the existing front yard setback (17 feet from face of dwelling).

General Plan and Zoning Conformance

The proposed rear yard deck extension for the single-family residence conforms to the land use designation for the site. The proposal is consistent with the low-density residential general plan designation.

The subject lot is below the minimum zoning standards of 6,000 square feet for the R-1B zoning district. The existing residence also has nonconforming side yard setbacks. However, adherence to Section 9.6.3(a) would allow a continuance of the existing setbacks.

As discussed earlier, the applicant proposes to reduce the rear yard setback from fifteen feet to eleven feet. The R-1B zoning district requires a minimum rear yard setback of fifteen feet. Thus, a variance is required.

Environmental Clearance (CEQA)

The proposed rear yard deck extension for the single family home is categorically exempt from the provisions of the California Environmental Quality Act by provision of Section 15301, Class 1 (e) (2)(a & b):

“Additions to existing structures provided that the addition will not result in an increase of more than 10,000 square feet if:

- (a) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and*
- (b) The area in which the project is located is not environmentally sensitive.*

The proposed deck extension will not increase the floor area for the dwelling and thus meet the above requirements for CEQA exemption.

Discussion

Variance Analysis

Nature and Purpose. A variance is a permit to construct a structure not otherwise permitted under the zoning regulations. Variances can only be granted to authorize a use or activity which is otherwise expressly authorized by the zoning regulations applicable to the parcel. Government Code Section 65906. Variances authorize deviations from regulations applicable to such physical standards as lot sizes, floor area ratios for buildings, and off-street parking requirements. As a result of granting a variance, basic zoning provisions are not being changed but the property owner is allowed to use his property in a manner basically consistent with the established regulations with minor deviations which place him in parity with other property owners in the same zone. Variances are, in effect, constitutional safety valves to permit administrative adjustments when a general regulation would be confiscatory or produce unique hardship. As indicated by the court in Hamilton v. Board of Supervisors (1969) 269 Cal.App.2d 64, 66, 75 Cal.Rptr. 106 as follows:

“They [variances] exist because it is recognized that, within a zone, there will be individual lots or tracts that, because of peculiar shape, unusual topography, or some similar peculiarity, cannot be put to productive use if all the detailed requirements for that zone are to be strictly applied. Hence administrative and quasi-judicial procedures are established, whereby the owner of such a piece of land may be allowed relatively minor variations from the strict letter of the law. Typical of such variations are those relating to setback lines, proportion of building size to lot area, and similar deviations. The concept is that the basic zoning provision is not being changed but that the owner of the individualized lot is allowed to use it, in a manner basically consistent with the established zone, but with such minor variations as will put him on a par with other property owners in the same zone whose lots conform in size, shape, topography, etc., to the overall pattern envisaged by the zoning ordinance. The procedures are created to bring the applicant to a substantial parity with other owners in the zone in devoting his property to the basic function of that zone; they are not created to give the applicant a better position than that enjoyed by his neighbors in the zone.”

Statutory Standards. State law provides statutory standards for the granting of variances. Variances can be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity, under an identical zoning classification. Any variance granted must be subject to conditions to

assure that the adjustment authorized does not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone where the property is located. A variance cannot be granted to authorize a use or activity which is not otherwise expressly authorized by the zoning regulations applicable to the parcel. Government Code Section 65906.

Supplementary Local Ordinance Provisions. The statutory standards contained in Government Code Section 65906 may be supplemented by harmonious local ordinances because state planning and zoning law is intended to provide minimum limitations. Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 511, note 6, 113 Cal.Rptr. 836.

Most local zoning ordinances incorporate the variance standards in Government Code Section 65906. And since California cities and counties granted variances long before there was any provision for them in the state statutes, some ordinances provide criteria and standards in addition to those contained in Government Code Section 65906. For example, some local ordinances provide that a variance may be granted only if it is compatible or consistent with the adopted general plan and/or the purposes and intent of the comprehensive zoning ordinance. Where local ordinance standards are adopted, they must be consistent with Government Code Section 65906. If local ordinances are consistent with state law, both state and local criteria must be satisfied to justify the grant of variance. Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 518, note 18, 113 Cal.Rptr. 836.

Belmont's Ordinances Regarding Variances

Belmont Zoning Ordinance Section 14 provides:

SECTION 14 – VARIANCES

- 14.1 PURPOSE – The hearing body may grant variances to any and all site development standards to prevent or lessen practical difficulties and unnecessary physical hardships inconsistent with the objectives of the Zoning Ordinance which may result, under specific circumstances, from the strict or literal interpretations of the regulations prescribed therein. The hearing body shall review all requests to variances to site development standards in excess of 10 percent of said standard(s). The Director of Community Development may administratively grant Exceptions to commercial and manufacturing site development standards up to an including 10 percent relief of said standard(s) as prescribed by Section 14.9 herein.
- 14.5 ACTION BY THE COMMISSION – The Commission shall receive, investigate, hear and take action upon every application for a Variance which is submitted in full accordance with the procedures set forth in Section 14.2 herein.

In rendering its decision pursuant to Section 14.5, the Planning Commission must consider all testimony offered and grant a variance only when it finds evidence to support the required

variance findings¹ of Section 14.5.1 of the Zoning Ordinance. Each of these findings must be made in the affirmative if the variance is to be granted.

Planning Commission Action

At the conclusion of the public hearing, the Planning Commission determined that it could not make all of the findings required by Section 14.5.1. As discussed earlier, a transcript of both Commission hearings (9/16/03 & 10/8/03) are attached for the Council's review. As indicated in Planning Commission Resolution 2003-50, findings (a), (c), (d) and (e) could not be made. The Resolution provides as follows:

- a. *The strict or literal interpretation and enforcement of the specified regulations would not result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan because Eckert has developed his property with two (2) decks and a patio providing seven hundred twenty-seven square feet (727') of outdoor recreational area. This represents a reasonable and productive use of his property.*

The purpose of the City's zoning regulations is to "promote and protect the public health, safety, peace, comfort, convenience and general welfare, and to provide a precise guide for the physical development of the City." Belmont Zoning Code Section 4.2.6 requires a 15-foot rear yard. Eckert's current two (2) decks totaling four hundred forty square feet (440') are built out to within 15-feet of his rear property line. Additionally, the ground level patio of two hundred seventy-two square feet (272') provides additional usable space. This area could be expanded further without a variance for additional outdoor recreational space. These decks and patio are constructed in a manner that gives Eckert direct and safe access to outdoor recreational space.

¹ To grant a variance, all of the findings in Section 14.5.1(a)-(e) of the Belmont Zoning Ordinance must be made in the affirmative. The findings provide:

- (a) *The strict or literal interpretation and enforcement of the specified regulation would result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan.*
- (b) *There are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property which do not apply generally to other properties classified in the same zoning district.*
- (c) *The strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by the owners of other properties classified in the same zoning district.*
- (d) *The granting of the Variance will not constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same zoning district.*
- (e) *The granting of the Variance will not be detrimental to the public health, safety or welfare, or be materially injurious to properties or improvements in the vicinity.*

Therefore, there is no practical difficulty or unnecessary physical hardship imposed on Eckert by the strict or literal interpretation and enforcement of the 15-foot rear yard requirement of the Zoning Ordinance. As indicated, Eckert enjoys the use of two (2) decks accessed from the dwelling, and also enjoys the use of a fully improved rear yard patio, providing additional recreational space opportunities. This patio can be directly and safely accessed via finished floor area on the lower level of the dwelling. The size and area of the open space/recreational opportunities provided by these decks and patio are equal to or in excess of the size of other properties' usable outdoor recreational space in the neighborhood. Thus, the strict application of R-1B District regulations would not result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan.

While Eckert argues that he should be entitled to a variance because the adjacent property obtained a deck variance, the Planning Commission finds that the two (2) lots are distinguishable. While the adjacent property is approximately the same size and slope, and has a mirror image building footprint, these properties are distinguishable due to floor plan layout of the structures located on each lot, currently existing safe and direct access to the backyard and existing outdoor improvements located on Eckert's property. In granting a variance to the adjacent property, the Planning Commission found that there was no safe access to their rear yard due to the slope of the lot and floor plan layout which left the ground floor of the property as unimproved dirt under floor area. Based upon this lack of access to outdoor living space, the Planning Commission approved a variance to allow total deck space of five hundred fifty square feet (550') for this adjacent property. The Planning Commission finds Eckert's property distinguishable because there is direct, safe access to a fully improved rear yard patio through finished floor area on the lower level of the dwelling. Additionally, Eckert's property currently contains four hundred forty square feet (440') of deck and an additional two hundred seventy-two square feet (272') of patio for a total of seven hundred twelve square feet (712') of improved, safely accessible and fully usable outdoor recreational space. Therefore, the strict or literal interpretation and enforcement of the rear yard requirements will not create practical difficulty or unnecessary physical hardship to Eckert.

- c. *The strict or literal interpretation and enforcement of the specified regulation would not deprive Eckert of privileges enjoyed by the owners of other properties classified in the same zoning district because Eckert has already obtained two (2) Floor Area Ratio Exceptions allowing him a home which exceeds the maximum allowed floor area. Additionally, he has developed two (2) decks built to the maximum size allowed by the*

Zoning Ordinance and a patio affording him outdoor living space equal to or in excess of owners of properties classified in the same zoning district.

The privilege to be enjoyed by owners in the applicable R-1 zoning district is productive use of the property as a single-family dwelling with appurtenant uses. One of the appurtenant uses is outdoor recreational space. Eckert has such use of his property. He has fully developed the property and, in the past, been granted two (2) floor area ratio (FAR) exceptions which permitted him to exceed the allowed floor area limitations in development of his home. An FAR exception granted in 1991 allowed for the construction of a family room, bathroom and study on the ground floor level of the property. In 1993, a second FAR exception was granted to allow additional construction on the middle level of his three story home.

Additionally, as indicated in finding (a) attached hereto and incorporated by this reference, he has existing outdoor recreational space equal to or in excess of that enjoyed by others in the same zoning district. Eckert's two (2) existing decks currently meet the R-1B (Single Family Residential) district required 15-foot rear yard setback and provide outdoor space for the property. A fully improved rear yard patio area also provides open space opportunities for the site. He has one hundred sixty-two square feet (162') more usable outdoor space than exists on the adjacent property. Therefore, the strict or literal interpretation and enforcement of the 15-foot rear yard requirement would not deprive Eckert of privileges enjoyed by the owners of other properties classified in the same zoning district.

- d. *The granting of the Variance will constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same zoning district because Eckert has already received two (2) Floor Area Ratio Exceptions allowing for development of his property in excess of the Zoning Ordinance requirements relative to maximum square footage allowed on his lot and already has improved accessible outdoor recreational space in excess of that existing on adjacent property.*

Eckert has already benefited by two (2) Floor Area Exceptions to allow increases in excess of the zoning requirements for the size of his dwelling. These approvals (1991 by City Council, and 1993 via an administrative exception) increased the size of Eckert's dwelling from 2,043 sq. ft. to 2,619 sq. ft. Because Eckert has already been granted two (2) exceptions to exceed floor area limitations on this small site and has two (2) decks and a patio on the ground level which exceed the outdoor recreational space available to adjacent property, the Planning Commission finds that Eckert has full and productive use of the property. Granting an additional variance to allow encroachment into the required rear yard would therefore constitute a grant of special privilege to this lot which has

already benefited from Zoning Ordinance exceptions allowing it to develop to a greater degree than similar property within the zoning district.

- e. *The granting of the variance will be detrimental to the public health, safety or welfare, or be materially injurious to properties or improvements in the vicinity due to the loss of auditory privacy that will occur by virtue of a deck extension into the required 15-foot rear yard adjacent to and directly above the rear yard downslope property at 1915 Hillman Avenue.*

The Planning Commission finds that granting the variance for the subject property would result in loss of some auditory privacy for the property directly behind and down slope (1915 Hillman Drive) of the subject site. While the current owners of the downslope property do not object to this application, the Planning Commission finds that encroachment on the required 15-foot rear yard would have negative impacts on auditory privacy which would be detrimental to the public health, safety, and welfare or materially injurious to other properties or improvements in the vicinity based on use of the deck in this fully developed neighborhood.

Belmont's Ordinance Regarding Appeals

SECTION 15 – APPEALS

- 15.10 ACTION BY COUNCIL – The Council shall hold a public hearing on an Appeal from a decision of the Commission or a review of proceedings upon its own initiation after notice thereof shall have been given as prescribed herein.

All evidence submitted at such hearing, except original public records or certified copies thereof, may be given under oath administered by the Mayor or the Vice Mayor.

The Council may affirm, reverse or modify a decision of the Commission provided that if a decision for denial is reversed or a decision to grant is modified, the Council shall, on the basis of the record transmitted by the Zoning Administrator and such additional evidence as may be submitted, make the findings prerequisite to the granting prescribed in this Ordinance.

The City Council is required to conduct a public hearing on Mr. Eckert's appeal. Attached to this staff report are the transcripts of the Planning Commission hearings, the Planning Commission Resolution denying the variance, and Mr. Eckert's appeal. The City Council, during its public hearing, is required to receive and consider this information and any additional evidence submitted prior to the conclusion of the Council's public hearing.

Appeal Analysis

Staff has reviewed the basis for Mr. Eckert's 10/20/03 appeal and has provided the following responses:

Appeal Argument #1:

Appellant: *“PC Resolution 2003-50(a) contains specific square footage numbers which were neither presented nor discussed at the hearing. For example, Finding A states that I have a 272 square foot ground-level patio. That is not true. I asked Carlos de Melo where that number came from, and he said it was based on some sort of drawing (but would not specify which drawing or show me the dimensions). There is no drawing which labels any area as “patio”, and there was no evidence presented by any party or any document which defines which area above my lower retaining wall is flagstone, wood decking and steps, or planted with large bushes. At its widest point my patio is 8 feet wide. It is not 34 feet long (the length required to accumulate 272 feet even if it stayed 8 feet wide which it does not). Thus, Finding A is based on false data, and it represents an abuse of discretion to adopt a resolution with numbers that cannot be rebutted or corrected.”*

Staff Response: Staff utilized the site plan (Page B-30 – Variance Appeal Evidence Packet) provided by Mr. Eckert to the City in advance of Commission review of the matter (September 2003) to assess the size of the ground floor patio. Using the scale (1/8 inch = 1 foot) indicated on this plan, staff calculated the surface area within the perimeter of the retaining wall piers to determine the size of the patio. Staff was conservative in its estimate, not counting the unusually large stair area/landing leading from the dwelling to the patio as well as the surface area enclosed by five retaining wall piers located directly adjacent to the rear face of the dwelling. This estimate also did not include patio areas or finished/surfaced space (if any) located between the retaining wall piers and the rear property line. In summary, based on the appellant's site plan, staff determined that approximately 272 square feet of rear patio exists for this property. Contrary to Appellant's Argument #1, Finding A is not based on false data. It does not represent an abuse of discretion and does not therefore constitute grounds for overturning the Planning Commission decision.

Appeal Argument # 2:

Appellant: *“PC Resolution 2003-50(a) draws conclusions that a reasonable and unbiased person would not draw. Finding A states that I have “direct and safe access to outdoor recreational space”, when in fact I presented photos and drawings showing that outdoor space to be 8 feet below the finished interior space of the house. I stated for the record that there are three short flights of stairs, and I quoted Craig Ewing's written opinion that those stairs do not provide safe access in wet weather. Finding A is an abuse of discretion since access is neither direct nor safe.”*

Staff Response: The subject dwelling provides stairs leading from the interior of the structure to the rear yard patio area. This access is directly from finished floor area in the dwelling, and does not traverse through crawlspace or unfinished areas of the dwelling. This stairway access is

measurable, predictable, and does not require a person to walk on unstable “dirt areas” to reach the outdoor patio. Based on these facts, the Commission determined that the appellants dwelling includes direct and safe access to outdoor recreational space for the property. Contrary to Appellant’s Argument #2, Finding A is supported by substantial evidence in the record. The Appellant has not demonstrated by this argument that the Planning Commission decision should be set aside.

Appeal Argument # 3:

Appellant: *“PC Resolution 2003-50(a) ignores evidence and asserts facts not in evidence. Finding A states “The size and area of the open space / recreational area opportunities provided by these decks and patio are equal to or in excess of the size of others in the same zoning district.” That is contrary to the evidence presented, since the Sirenko deck is 9.5 feet wide and there is no outside usable space on my lot over 8 feet wide. Note the resolution distinguishes between “size” and “area”, since Commissioners have stated for the record on several occasions that a 6 foot wide deck does not represent usable outdoor space (table and chairs won’t fit, etc). I presented drawings of four adjacent properties and their decks, and no other deck dimensions were presented. Since no deck with a width smaller than mine was documented, Finding A is not supported by the evidence in the record.”*

Staff Response: The subject property includes finished outdoor recreational space in excess of at least one other identically zoned (R-1B) property in the neighborhood. For purposes of quantifying “space” as it relates to outdoor recreation areas in comparing properties, it is defined as the total amount of square footage of either decking or finished patios for such properties. Irrespective of the dimensions of the existing decking or outdoor patio areas for the subject property, the total square footage of these areas is equal to or exceeds the amount provided for others in the same zoning district. The Planning Commission’s finding in this regard is supported by substantial evidence. The Appellant has failed to demonstrate that this finding represents an abuse of discretion.

Appeal Argument # 4:

Appellant: *“PC Resolution 2003-50(c) states that denying a setback variance for me would not deprive me of privileges enjoyed by others “because Eckert has already obtained two Floor Area Ratio Exceptions.” The specific privilege enjoyed by others is to have a deck wide enough for a table and chairs which is on the living/dining/kitchen level of the house (not 18 feet below it, as my patio is). If the Sirenkos apply for another FAR exception or variance, they are free to cite my interior construction as justification. The Commission wrote at length about “outdoor recreational space” when granting the Sirenko deck setback encroachment, and it is outdoor space, not indoor space, that others enjoy and which I am being denied. Since the Commission vainly tries to make a FAR Exception the same as a Setback Variance, and tries to make indoor space the same as outdoor space, Finding C is an abuse of discretion.”*

Staff Response: The specific privilege to be enjoyed is not relative to the width or dimensions of existing decks or patios provided for the subject property, but the expected right of productive

use of the property as a single-family dwelling with appurtenant uses. Mr. Eckert has enjoyed such use through full development of his property via the granting of two (2) floor area ratio (FAR) exceptions, which permitted him to exceed the allowed floor area limitations for his dwelling. Additionally Mr. Eckert's property has outdoor recreational space (via existing decks and a patio area) equal to or in excess of that enjoyed by others in the same zoning district. Based these facts, the Commission reasoned that the strict or literal interpretation and enforcement of the 15-foot rear yard requirement would not deprive Eckert of privileges enjoyed by the owners of other properties classified in the same zoning district. The Planning Commission's finding is supported by substantial evidence in the record. The Appellant has failed to demonstrate that this finding represents an abuse of discretion.

Appeal Argument # 5:

Appellant: *"PC Resolution 2003-50(c) states that I have "162 square feet more usable outdoor space than exists on the adjacent property," but fails to define "usable." I presented a photo of my neighbor's flat back yard with only two steps down from his back door. Is that space not usable? Would it become usable if it were turned into a patio? Would my space be unusable if I had not landscaped my back yard? These questions would lead a reasonable and unbiased person to the conclusion that variances are easier to obtain if you rip out your landscaping first, and after receiving the variance you are free to landscape and have both! Remember that the Sirenkos are free to build a deck right out to the property line, as 1915 Hillman did, without a variance and without a permit, as long as they stay within 30 inches of grade (as per Staff testimony at the Commission hearing). Putting flagstone on the dirt doesn't make the difference between usable and unusable, so Finding C represents an abuse of discretion."*

Staff Response: Irrespective of any future intentions of landscaping/patio installations for either Mr. Eckert's property or for the adjacent property (1816 Oak Knoll), the clear fact is that the amount of existing outdoor recreational space via either decking or a finished patio area for Mr. Eckert's property exceeds that of the adjacent property. The dimension or width of Eckert's outdoor recreational space (via existing decks or patio) is immaterial relative to a direct comparison in the amount of space provided for these two properties. Although the adjacent property (1816 Oak Knoll) has potentially usable rear yard areas for the conversion to outdoor recreation space, they have not been modified in such a manner at this time. Mr. Eckert's dwelling has two usable decks which meet current rear yard requirements and he has further created usable outdoor space via the installation of a rear yard patio area. As discussed earlier, the total square footage of these outdoor recreational areas exceeds that of the adjacent property (1816 Oak Knoll). The Appellant's arguments to the contrary are not supported by the evidence and do not constitute grounds to overturn the Planning Commission's decision.

Appeal Argument # 6:

Appellant: *"PC Resolution 2003-50(d) deliberately and inappropriately mixes FAR exceptions and setback variances. Finding D makes explicit what the Planning Commission has been doing all along: They justified a setback variance for the Sirenko property based on a FAR exception for my property. At the first hearing for Sirenko's variance application, Commissioners grilled*

me about the particulars of my house and made false statements about both houses. This was inappropriate and an early demonstration of the bias that continues to this day. The interior of my house has no bearing whatsoever on the granting of a setback variance for a neighbor's property, much less on my property. The finding is supposed to address "special privilege inconsistent with the limitations on other properties," not trade one limitation off against another. The Sirenkos were allowed to expand their building envelope and create a wide deck for outdoor recreation. I was not. Allowing my variance would be consistent, not inconsistent as the resolution says, so Finding D is an abuse of discretion."

Staff Response: Because Mr. Eckert has already benefited by two (2) Floor Area Exceptions to exceed floor area limitations for his property and has two (2) decks and a ground level patio which exceed the outdoor recreational space available to adjacent property, the Commission reasoned that Mr. Eckert has full and productive use of his property.

The Planning Commission decision reached in granting a similar setback variance for the adjacent property (1816 Oak Knoll) was based on a specific set of factors related to that property. Furthermore, approval of a variance for one property does not confer the right of approval for another property. Each project is evaluated on a case-by-case basis to determine if specific factors related to the subject property warrant approval of the request.

The Commission determined that approval of a setback variance was warranted for 1816 Oak Knoll (adjacent lot) to bring this property up to "par" with other properties in the neighborhood. However, the Commission reasoned that granting of an additional rear yard encroachment variance for Mr. Eckert's property would constitute a grant of special privilege for this lot which has already benefited from Zoning Ordinance exceptions allowing it to develop to a greater degree than similar property within the zoning district. The Appellant's arguments to the contrary are not supported by the evidence and do not constitute grounds for overturning the Planning Commission's decision.

Appeal Argument # 7:

Appellant: *"PC Resolution 2003-50(e) asserts without proof the opposite conclusion drawn from identical data for another property. When granting the Sirenko variance, the Commission ignored strong privacy objections from a neighbor and found that a larger deck on an upslope property actually improves privacy. When denying my variance, they found a larger deck would reduce privacy, and they originally drew that conclusion "based on testimony of a neighbor." When that neighbor sold their property and the new owner signed a letter consistent with other letters signed for the Sirenko project (asking the City to grant the variance because privacy would be improved), the Commission no longer had any basis for making the finding that the deck would be detrimental. Every affected property owner signed a petition and/or a specific letter supporting the project. The Commission fabricated a new concern of "auditory privacy," unrelated to the particulars of the project, which would appear to make all rear yard setback encroachments detrimental. The Commission had specifically rejected auditory privacy concerns when granting the Sirenko variance. Because there was no allegation or evidence to support their conclusion. Finding E is not based on evidence in the record."*

Staff Response: Previous owners of the property downslope (1915 Hillman Drive) from Mr. Eckert's property voiced concerns of loss of privacy and a perceived loss of sunlight that would result from the granting of the deck extension. Although the new owners at 1915 Hillman Drive do not object to Mr. Eckert's deck variance application, the Commission has the opportunity and right to review public health, safety, and welfare issues or whether a proposal would be injurious to other properties consistent with required BZO Variance finding 14.5.1.e² and these conclusions are supported by substantial evidence in the record.

As discussed earlier, each development application (in this instance a Variance request) is reviewed on a case-by-case basis. In this case, the Planning Commission believed the granting of the variance for 1814 Oak Knoll Drive would result in *some* loss of auditory privacy for 1915 Hillman Drive based on use of this deck in this fully developed neighborhood. The Commission did not *fabricate* a concern, but merely reviewed the words of this finding to assess whether a public health, safety, welfare, or material injury to property issue (as they have a right to determine) would result in light of testimony from a neighbor. Finally, the Commission determination made relative to Mr. Eckert's Variance request does not render all rear yard setback encroachments as detrimental. This determination was *specifically* made related to the particulars of this project, for this site.

Mr. Eckert's Submittal of New Information (Since 10/20/03 Appeal)

As discussed earlier, Mr. Eckert presented a CD-ROM to the City in May 2004 (with hard copy follow up in December 2004), which contains new information in support of his requested appeal of the Planning Commission decision.

Key components of this new information (evaluated by staff – see below) include Mr. Eckert's analysis of:

- Planning Commission Decisions on Variances – 1998-2003.

Staff Response: Mr. Eckert evaluated 32 Planning Commission resolutions relating to Variances to development standards (setbacks, height, parking, etc.) reviewed by the Planning Commission during the above time period. Mr. Eckert notes that of these Variances, 27 were approved and 5 were denied (two of them being the setback variance sought for his property). Staff continues to maintain that approval of a Variance for one property does not confer the right to an approval for a Variance for another property. Each case is unique, and past actions do not set a precedent for future approvals or denials of a project. This information from the Appellant does not demonstrate that the Commission abused its discretion in rendering its decision for his project.

- An Administrative Floor Area Exception (FAE) approval granted on May 3, 2004 for the property at 1816 Oak Knoll Drive.

² 14.5.1.e - *The granting of the Variance will not be detrimental to the public health, safety or welfare, or be materially injurious to properties or improvements in the vicinity.*

Staff Response: In his comments to the Council on May 25, 2004, Mr. Eckert indicated that the Administrative Floor Area Exception granted at 1816 Oak Knoll Drive was a key action related to his appeal. The approved FAE (constituting a 344 sq. ft. conversion of crawlspace to habitable floor area) would result in an increase in the total floor area from 2,079 sq. ft. to 2,423 sq. ft. for this property. Although the dwelling at 1816 Oak Knoll would still be almost 200 sq. ft. smaller than Mr. Eckert's 2,619 sq. ft. dwelling, he rationalizes that approval of this recent floor area exception placed that property on more equal footing with his property in terms of total allowed floor area, thus justifying the necessary approval of his rear yard setback variance. This is because 1816 Oak Knoll has received a similar rear yard setback variance approval (Mr. Eckert has not), and these two properties are similar in size, shape, and topography; thus in Mr. Eckert's opinion in the interest of fairness, a rear yard setback variance is justified for his property.

It should be noted that the building permit application for the residential addition granted (via the May 2004 Admin. FAE) for 1816 Oak Knoll expired on 1/31/05, and staff has not received any requests from the property owner to reinstate the permit. In addition, the Admin FAE approval lapsed on May 3, 2005 as per Belmont Zoning Ordinance Section 4.2.10.G³, and staff has not received any inquiries from the property owner to extend this approval.

In essence, if the "vesting" of the Admin FAE for 1816 Oak Knoll does not materialize through an approved extension and subsequent issuance of a building permit, Mr. Eckert's "parity" argument for these two properties (based on similarly approved FAE's justifying similar setback variance approvals), is irrelevant. Even if this FAE is acted upon, the Appellant has failed to demonstrate that the findings of the Planning Commission are an abuse of discretion.

Previously submitted appeal information also contained in Mr. Eckert's evidence packet includes:

- A chronological collection of documents (staff reports, resolutions, etc.) relating to both Commission and Council review of the requested setback variance.
- Documents related to the approved setback variance for 1816 Oak Knoll Drive (adjacent property), approved Floor Area Exceptions for both 1814 and 1816 Oak Knoll Drive, and the property at 1915 Hillman Drive (adjacent downslope property to the rear of 1814 Oak Knoll).

³ BZO Section 4.2.10.G

LAPSE OF RESIDENTIAL FLOOR AREA EXCEPTION AND EXTENSION OF TIME – An extension shall lapse and shall become null and void one year following the date upon which it became effective, unless prior to the expiration of one year, a building permit is issued by the Building Official and construction is commenced and diligently pursued toward completion on the site, or a certificate of occupancy is issued by the Building Official for the site which was the subject of the Exception application. Extensions of time shall be governed by Section 10.5.

Staff Response: The submittal of this information provides a comprehensive compilation of the administrative record on the actions taken (Floor Area Exceptions & Variances) for Mr. Eckert's property, and adjacent properties. This summary information does not substantiate Mr. Eckert's claim of Commission mistreatment in judging the requested setback variance for his property.

Conclusion

Staff recommends that the City Council deny the appeal in its entirety. The Appellant has not, in his appeal, demonstrated that the Planning Commission abused its discretion. He has been unable to do so because the record contains substantial evidence to support the Planning Commission's decision that it could not make Variance findings 14.5.1 (a), (c), (d), and (e). Absent this showing, there is no basis upon which the City Council should overturn or modify the Planning Commission's decision.

Fiscal Impact

None.

Public Contact

1. The City Council is required to hold a public hearing on an appeal of a Planning Commission decision as per Section 15.10 (Appeals) of the BZO. The City placed a public notice display ad in the local newspaper of general circulation (San Mateo Times) for a minimum 10-day period beginning on April 30, 2005, for the scheduled public hearing by the City Council on May 10, 2005. The City also mailed the appeal hearing public notice to all property owners within 300 feet of the subject site and other interested parties to inform such persons of the scheduled appeal hearing.
2. Appellant was also informed of the appeal hearing.

Recommendation

Staff does not find sufficient basis in the Appellant submittal to overturn the Planning Commission's decision and recommends the City Council adopt the attached resolution upholding the Planning Commission's decision to deny the Variance to allow a four-foot deck extension into the required 15-foot rear yard at 1814 Oak Knoll Drive.

Alternative

1. Direct staff to prepare a resolution based on findings provided by the City Council to grant the appeal, overturn the decision of the Planning Commission, and approve the Variance to

allow a four foot deck extension into the required 15-foot rear yard for the single family dwelling at 1814 Oak Knoll Drive.

2. Continue the matter and direct staff to prepare an alternative course of action.

Attachments

- A. Appeal Application – 10-20-03
- B. City Council Resolution Denying the Setback Variance and Upholding the Planning Commission Decision
- C. Draft City Council Resolution Approving the Setback Variance and Overturning the Planning Commission's Decision
- D. Appellant Evidence Packet (Hard Copy) – December 14, 2004 (Previously Provided to Council)
- E. September 16, 2003 Planning Commission Staff Report and Agenda Item Transcript
- F. October 8, 2003 Planning Commission Memorandum, Resolution Denying the Setback Variance, and Agenda Item Transcript

Respectfully submitted,

Carlos de Melo
Principal Planner

Craig A. Ewing, AICP
Community Development
Director

Daniel Rich
Interim City Manager

RESOLUTION NO. _____

ATTACHMENT B

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELMONT
UPHOLDING THE PLANNING COMMISSION'S DECISION
TO DENY A VARIANCE AT 1814 OAK KNOLL DRIVE (APPL. NO. 2001-0356)**

WHEREAS, Steven Eckert, property owner, has requested a Variance to allow a four foot deck extension into the required 15-foot rear yard for the single family dwelling at 1814 Oak Knoll Drive; and,

WHEREAS, a public hearing was duly noticed, held, and closed on May 10, 2005; and,

WHEREAS, the City Council of the City of Belmont finds the project to be categorically exempt pursuant to the California Environmental Quality Act, Section 15301, and,

WHEREAS, the City Council hereby adopts the staff report dated May 10, 2005 and the facts contained therein as its own findings of fact; and,

WHEREAS, the City Council did hear and use their independent judgment and considered all said reports, recommendations and testimony hereinabove set forth; and,

WHEREAS, the City Council finds the required variance findings (a), (c), (d) and (e) of Section 14.5.1 of the Zoning Ordinance cannot be made in the affirmative for the following reasons:

- a. *The strict or literal interpretation and enforcement of the specified regulations would not result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan because Eckert has developed his property with two (2) decks and a patio providing seven hundred twenty-seven square feet (712') of outdoor recreational area. This represents a reasonable and productive use of his property.*

The purpose of the City's zoning regulations is to "promote and protect the public health, safety, peace, comfort, convenience and general welfare, and to provide a precise guide for the physical development of the City." Belmont Zoning Code Section 4.2.6 requires a 15-foot rear yard. Mr. Eckert's current two (2) decks totaling four hundred forty square feet (440') are built out to within 15-feet of his rear property line. Additionally, the ground level patio of two hundred seventy-two square feet (272') provides additional usable space. This area could be expanded further without a variance for additional outdoor recreational space. These decks and patio are constructed in a manner that gives Mr. Eckert direct and safe access to outdoor recreational space.

Therefore, there is no practical difficulty or unnecessary physical hardship imposed on Eckert by the strict or literal interpretation and enforcement of the 15-foot rear yard requirement of the Zoning Ordinance. As indicated, Mr. Eckert enjoys the use of two (2) decks accessed from the dwelling, and also enjoys the use of a fully improved rear yard patio, providing additional recreational space opportunities. This patio can be directly and safely accessed via finished floor area on the lower level of the dwelling. The size and area of the open space/recreational opportunities provided by these decks and patio are equal to or in excess of the size of other properties' usable outdoor recreational space in the neighborhood. Thus, the strict application of R-1B District regulations would not result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan.

While Mr. Eckert argues that he should be entitled to a variance because the adjacent property obtained a deck variance, the City Council finds that the two (2) lots are distinguishable. While the adjacent property is approximately the same size and slope, and has a mirror image building footprint, these properties are distinguishable due to floor plan layout of the structures located on each lot, currently existing safe and direct access to the

backyard and existing outdoor improvements located on Mr. Eckert's property. In granting a variance to the adjacent property, the Planning Commission found that there was no safe access to their rear yard due to the slope of the lot and floor plan layout which left the ground floor of the property as unimproved dirt under floor area. Based upon this lack of access to outdoor living space, the Planning Commission approved a variance to allow total deck space of five hundred fifty square feet (550') for this adjacent property. The City Council finds Mr. Eckert's property distinguishable because there is direct, safe access to a fully improved rear yard patio through finished floor area on the lower level of the dwelling. Additionally, Mr. Eckert's property currently contains four hundred forty square feet (440') of deck and an additional two hundred seventy-two square feet (272') of patio for a total of seven hundred twelve square feet (712') of improved, safely accessible and fully usable outdoor recreational space. Therefore, the strict or literal interpretation and enforcement of the rear yard requirements will not create practical difficulty or unnecessary physical hardship to Mr. Eckert.

- c. *The strict or literal interpretation and enforcement of the specified regulation would not deprive Eckert of privileges enjoyed by the owners of other properties classified in the same zoning district because Eckert has already obtained two (2) Floor Area Ratio Exceptions allowing him a home which exceeds the maximum allowed floor area. Additionally, he has developed two (2) decks built to the maximum size allowed by the Zoning Ordinance and a patio affording him outdoor living space equal to or in excess of owners of properties classified in the same zoning district.*

The privilege to be enjoyed by owners in the applicable R-1 zoning district is productive use of the property as a single-family dwelling with appurtenant uses. One of the appurtenant uses is outdoor recreational space. Mr. Eckert has such use of his property. He has fully developed the property and, in the past, been granted two (2) floor area ratio (FAR) exceptions which permitted him to exceed the allowed floor area limitations in development of his home. An FAR exception granted in 1991 allowed for the construction of a family room, bathroom and study on the ground floor level of the property. In 1993, a second FAR exception was granted to allow additional construction on the middle level of his three story home. Additionally, as indicated in finding (a) attached hereto and incorporated by this reference, he has existing outdoor recreational space equal to or in excess of that enjoyed by others in the same zoning district. Mr. Eckert's two (2) existing decks currently meet the R-1B (Single Family Residential) district required 15-foot rear yard setback and provide outdoor space for the property. A fully improved rear yard patio area also provides open space opportunities for the site. He has one hundred sixty-two square feet (162') more usable outdoor space than exists on the adjacent property. Therefore, the strict or literal interpretation and enforcement of the 15-foot rear yard requirement would not deprive Mr. Eckert of privileges enjoyed by the owners of other properties classified in the same zoning district.

- d. *The granting of the Variance will constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same zoning district because Eckert has already received two (2) Floor Area Ratio Exceptions allowing for development of his property in excess of the Zoning Ordinance requirements relative to maximum square*

footage allowed on his lot and already has improved accessible outdoor recreational space in excess of that existing on adjacent property.

Mr. Eckert has already benefited by two (2) Floor Area Exceptions to allow increases in excess of the zoning requirements for the size of his dwelling. These approvals (1991 by City Council, and 1993 via an administrative exception) increased the size of Mr. Eckert's dwelling from 2,043 sq ft. to 2,619 sq. ft. Because Mr. Eckert has already been granted two (2) exceptions to exceed floor area limitations on this small site and has two (2) decks and a patio on the ground level which exceed the outdoor recreational space available to adjacent property, the City Council finds that Mr. Eckert has full and productive use of the property. Granting an additional variance to allow encroachment into the required rear yard would therefore constitute a grant of special privilege to this lot which has already benefited from Zoning Ordinance exceptions allowing it to develop to a greater degree than similar property within the zoning district.

- e. *The granting of the variance will be detrimental to the public health, safety or welfare, or be materially injurious to properties or improvements in the vicinity due to the loss of auditory privacy that will occur by virtue of a deck extension into the required 15-foot rear yard adjacent to and directly above the rear yard downslope property at 1915 Hillman Avenue.*

The City Council finds that granting the variance for the subject property would result in loss of some auditory privacy for the property directly behind and down slope (1915 Hillman Drive) of the subject site. While the current owners of the downslope property do not object to this application, the City Council finds that encroachment on the required 15-foot rear yard would have negative impacts on auditory privacy which would be detrimental to the public health, safety, and welfare or materially injurious to other properties or improvements in the vicinity based on use of the deck in this fully developed neighborhood.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont hereby upholds the Planning Commission's decision denying the Variance to allow construction of a four-foot deck extension into the required 15-foot rear yard at 1814 Oak Knoll Drive, based on the aforementioned findings.

* * * * *

I hereby certify that the foregoing resolution was duly and regularly passed and adopted by the City Council of the City of Belmont at a regular meeting held thereof held on May 10, 2005 by the following vote:

AYES, COUNCILMEMBERS: _____

NOES, COUNCILMEMBERS: _____

ABSTAIN, COUNCILMEMBERS: _____

ABSENT, COUNCILMEMBERS: _____

RECUSED, COUNCILMEMBERS:_____

CLERK of the City of Belmont

APPROVED:

MAYOR of the City of Belmont

RESOLUTION NO. _____

ATTACHMENT C

**DRAFT RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELMONT
UPHOLDING THE APPEAL AND OVERTURNING THE PLANNING COMMISSION'S
DECISION TO DENY A VARIANCE AT 1814 OAK KNOLL DRIVE
(APPL. NO. 2001-0356)**

WHEREAS, Steven Eckert, property owner, has requested a Variance to allow a four foot deck extension into the required 15-foot rear yard for the single family dwelling at 1814 Oak Knoll Drive; and,

WHEREAS, a public hearing was duly noticed, held, and closed on May 10, 2005; and,

WHEREAS, the City Council of the City of Belmont finds the project to be categorically exempt pursuant to the California Environmental Quality Act, Section 15301, and,

WHEREAS, The City Council finds the required variance findings of Section 14.5.1 (a-e) of the Zoning Ordinance can be made in the affirmative for the following reasons:

- a. The strict or literal interpretation and enforcement of the specified regulations would result in practical difficulty or unnecessary physical hardship inconsistent with the objectives of the Zoning Plan.*
- b. There are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property which do not apply generally to other properties classified in the same zoning district.*
- c. The strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by the owners of other properties classified in the same zoning district.*
- d. The granting of the Variance will not constitute a grant of special privilege inconsistent with the limitations on other properties classified in the same zoning district.*
- e. The granting of the variance will not be detrimental to the public health, safety or welfare, or be materially injurious to properties or improvements in the vicinity.*

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont hereby upholds the appeal and overturns the Planning Commission's decision denying the Variance to allow construction of a four-foot deck extension into the required 15-foot rear yard at 1814 Oak Knoll Drive, based on the aforementioned findings.

* * * * *

I hereby certify that the foregoing resolution was duly and regularly passed and adopted by the City Council of the City of Belmont at a regular meeting held thereof held on May 10, 2005 by the following vote:

AYES, COUNCILMEMBERS: _____

NOES, COUNCILMEMBERS: _____

ABSTAIN, COUNCILMEMBERS: _____

ABSENT, COUNCILMEMBERS: _____

RECUSED, COUNCILMEMBERS: _____

APPROVED:

CLERK of the City of Belmont

MAYOR of the City of Belmont

PLEASE NOTE:

Attachments A, D, E, and F are not included as part of this document – please contact the City Clerk’s Office at (650) 595-7413 for further information on these attachments